OCT 26 1973

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

No. 73-694

A. HENRY TAGER,
Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI

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I.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported in 481 F.2d 97. A copy of the opinion is appended hereto as Appendix A.

II.

GROUNDS FOR JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit affirming the judgment of conviction of the United States Circuit Court for the District of Kansas, sought to be reviewed herein, was entered on May 14, 1973. Petitioner's Petition for Rehearing was denied on August 27, 1973. A copy of the order denying said Petition for Rehearing is appended hereto as Appendix B. By

order dated September 17, 1973, Petitioner was granted an extension of time to October 26, 1973, within which to petition for certiorari.

Jurisdiction is conferred upon the Court to review the judgment of the Court of Appeals for the Tenth Circuit by virtue of 28 U.S.C. Sec. 1254 and Rules 19 and 22 of the Rules of the Supreme Court.

III.

QUESTIONS PRESENTED FOR REVIEW

A. In the area of pretrial discovery in criminal cases, should the Court clarify the apparent conflict between its holding in *Brady* v. *Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and 18 U.S.C. Sec. 3500, as amended in 1970, the statutory version of the so-called Jencks Rule,[1] or at least delineate an accommodation between *Brady* and the Jencks Act? As a subsidiary question fairly comprised therein, was it error of reviewable dimensions for the trial court to deny pretrial access to grand jury testimony of key witnesses who testified at the trial which would have disclosed evidence favorable to the defendant, and which would have enabled the defendant to prepare for trial in such a manner so as to counteract intolerably unfair tactics on the part of the Government with respect to these witnesses?

B. On the question of *when* a defendant is entitled to production of *Brady* material, should not the Court clarify whether pretrial timing will be the rule, or whether *Brady* is to be coordinated with 18 U.S.C. 3500, thereby permitting

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1. The statutory provisions evolved from the Court's decision on disclosure in *Jencks* v. *United States*, 353 U.S. 657, 77 S.Ct. 1007, 1 L.Ed.2d 1103 (1957). See also *Dennis* v. *United States*, 384 U.S. 855, 86 S.Ct. 1840, 16 L.Ed.2d 973 (1966), allowing production of grand jury testimony.

the statute to qualify the apparent holding of *Brady* so that favorable material need not be produced until a witness has testified on direct examination? As subsidiary questions fairly comprised therein, and of necessity closely related thereto, if *Brady* is to have continued vitality, who decides whether evidence is favorable to the defendant; can such evidence always be discovered in the absence of an open file system; and does the term "favorable" exclude evidence which may be unfavorable, but which may also be of inestimable value to a defendant taking into consideration the peculiar facts of the case?

C. Does the record in this case reflect such utter, complete, and legally embarrassing lack of proof, so as to invite the Court's summary intervention?

D. Did not gross and extreme prejudice result to the Petitioner by the Government's calling of favorable witnesses for the Petitioner and then proceeding to impeach them by the use of grand jury testimony (unavailable to Petitioner prior to trial) without laying a proper foundation for such impeachment, and by the failure of the court to give cautionary instructions? As a subsidiary question fairly comprised therein, is there a conflict here with the Court's holding in *Bridges* v. *Wixon*, 326 U.S. 135, 65 S.Ct. 1443 (1945) on the use of impeachment material as substantive evidence?

E. Was the Petitioner prejudiced by the fact that the Government, in a simple case, which had all the facts shortly after the arrest of an alleged co-conspirator, waited eighteen months before seeking an indictment? As a subsidiary question fairly comprised therein, was the defendant prejudiced under the standard delineated in *United States* v. *Marion*?[2]

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2. 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971).

F. Was the granting of immunity to an unindicted co-conspirator in open court in front of the jury, after he had taken the Fifth Amendment, seriously prejudicial to the defendant, when it was known to the Government in advance of trial that the witness would take the Fifth Amendment?

IV.

STATUTORY PROVISIONS

Constitution of the United States

Fifth Amendment:

"*Grand jury—indictment—jeopardy—process of law—taking property for public use.*—No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Sixth Amendment:

"*Rights of accused.*—In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the

accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense."

18 U.S.C. Sec. 371:

"*Conspiracy to commit offense or to defraud United States.*—If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

18 U.S.C. Sec. 2314:

"*Transportation of stolen goods, securities, moneys, fraudulent state tax stamps, or articles used in counterfeiting.*—Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud;

* * *

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

18 U.S.C. Sec. 2315:

"*Sale or receipt of stolen goods, securities, moneys, or fraudulent State tax stamps.*—Whoever receives, con-

ceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of $500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken; or * * *

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

V.

STATEMENT OF THE CASE

The Petitioner was indicted on August 6, 1971, in the United States District Court for the District of Kansas. The indictment contained three counts: Count I charged that between February 6 and February 9, 1970, Petitioner and co-defendant, James J. Konys, conspired with each other and two unindicted co-conspirators, David L. Casady and Boyd Rasmussen, to knowingly receive, transport, and cause to be transported in interstate commerce a stolen United States Treasury Bill with a face value of $100,000.00 in violation of 18 U.S.C. Sec. 371; that it was part of a conspiracy that Konys would deliver the Bill to Casady in Las Vegas, Nevada, who would permit Petitioner to inspect it; that Casady at the direction of petitioner would transport the Bill from Las Vegas to Kansas City, Kansas, where Petitioner would receive cash in excess of $30,000.00 for the Bill; that Casady would give $25,000.00 to Konys at Las Vegas, retain the sum of $5,000.00 to be shared with Rasmussen, and that Tager would receive the balance of the proceeds. Six overt acts were alleged: (1) A conversation between Casady and Konys at Las Vegas on February 6,

1970; (2) A conversation at Las Vegas on February 7, 1970, between Casady and Petitioner; (3) That Petitioner travelled from Las Vegas to Kansas City, Missouri, on February 8, 1970; (4) That on February 8 and 9, 1970, Casady travelled from Las Vegas to Kansas City, Missouri; (5) On February 9, 1970, Casady and Petitioner travelled from Kansas City, Missouri, to Kansas City, Kansas; (6) That Petitioner received the Bill from Casady on February 9, 1970, and thereafter consulted with bank officials at the Twin City Bank at Kansas City, Kansas, for the purpose of determining how to dispose of the Bill (3 R. 1-3).[3]

Count II charged that Petitioner and Konys caused the Treasury Bill to be transported from Las Vegas, Nevada, to Kansas City, Kansas, in violation of 18 U.S.C. Sec. 2314 (3 R. 3). Count III charged that Petitioner received the Treasury Bill, which was moving in interstate commerce, in violation of 18 U.S.C. Sec. 2315 (3 R. 3-4).

The case went to trial before a jury on December 14, 1971. On December 21, 1971, the jury returned verdicts of guilty on all of the charges (3 R. 73). A 5-year sentence was imposed on the conspiracy count with the provision that 90 days were to be served in a jail-type institution. The execution of the remainder of the sentence was suspended and the Petitioner placed on probation. Imposition of sentences on the substantive counts were suspended and the Petitioner placed on probation for a period of five years (3 R. 86).

Motions for a New Trial, To Set Aside Verdict and to Render a Judgment of Acquittal were duly filed (3 R. 74-83). The motions were denied on February 16, 1972 (3

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3. "R" refers to the three-volume record: Volumes 1 and 2 are the transcript of the trial; Volume 3 is the District Court record.

R. 84). Notice of Appeal was filed on April 3, 1972 (3 R. 89).

Konys did not appeal.

EVIDENCE

On February 6, 1970, Casady (unindicted), a real estate promoter, flew from his home in Oxnard, California, to Las Vegas, Nevada, to confer with Rasmussen (also unindicted) about a transfer of stock in the Nevco Blue-Jay Corporation. Rasmussen was president of the company (1 R. 177-178). Casady knew Konys, and after the business with Rasmussen was concluded, ascertained that Konys was confined to the Sunrise Hospital at Las Vegas. After registering at the Aladdin Hotel, he received a call from Konys asking him to come to the hospital (1 R. 177, 178-182).

At the hospital Konys produced a $100,000.00 Treasury Bill and asked Casady if he would be able to obtain a loan on it. He needed about $25,000.00. Casady could have anything he obtained over that amount. Konys stated that the Bill was genuine, but shook it. Casady was allowed to testify that he interpreted the gesture as indicating that there was something wrong with the Bill (1 R. 184-188). A motion to strike such testimony was denied (1 R. 188).

After leaving the hospital, Casady called Rasmussen and told him about the Bill. In response to Rasmussen's query as to why the Bill could not be taken to a bank, Casady said that the money was needed right away. Rasmussen suggested that the Bill was "hot"; Casady didn't know. Rasmussen said he would see what he could do (1 R. 189-190, 97, 101, 104).

On the following day (Saturday, February 7), Rasmussen called Gilbert Barnes, a local businessman, and asked if he could loan money against the Bill. Barnes replied that he could not handle it, but that there was a man in his office at that time who might be interested (1 R. 109). This man was Petitioner, who up to that time was not acquainted with either Casady or Konys. Barnes switched on a speaker phone and Rasmussen repeated his request to Petitioner (1 R. 109-111, 191, 468).

The exact nature of the conversation is not clear from the evidence. Barnes testified that Petitioner asked why the Bill could not be taken to a bank, to which Rasmussen replied that he would not be able to borrow that kind of money without approval of the Board of Directors. The Government then read Barnes' grand jury testimony to him to the effect that there had never been any discussion about taking the Bill to a Las Vegas bank. Barnes said that the testimony was true (1 R. 468-476).[4]

Tager, an attorney, asked questions about the authenticity of the Bill, asked to see the Bill, and advised that he would want to show the Bill to his banker in Kansas City (1 R. 193, 468-469, 496-499). This information was transmitted to Casady (1 R. 191).

Arrangements were made to meet later in the afternoon to view the Bill. Barnes drove Petitioner, Rasmussen,

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4. The reading of grand jury testimony to favorable witnesses for the defendant as substantive evidence, without cautionary instructions, was an integral part of the Government strategy as will be later discussed. The witnesses labored under the burden of not being able to refresh their recollection either before they testified before the grand jury, or at the trial, or from the notes taken by agents shortly after the arrest of Casady. In this manner the Government was able to get into evidence hearsay as substantive evidence, and to cast doubts on the veracity of any witness who tended to be favorable to Petitioner—good, but indefensible strategy in a weak criminal case.

Casady, and a man named Jay L. Fihn, an acquaintance of Petitioner who was in Barnes' office at the time of the Rasmussen conversation, to the Sunrise Hospital. Casady went into the hospital and returned with the Bill which he displayed to Petitioner. After looking at the Bill, the Petitioner stated it looked genuine to him, and wrote down the serial number. He added that he would like to check it out with his bank, and if it checked out, he might be able to get a loan against it (1 R. 112).

After the Bill was examined, Casady took it, returned to the hospital, and then to the car. The parties disbanded at the Aladdin Hotel. While returning, Petitioner said he thought he could get the money from his bank if it checked out. He repeatedly stated that he must check on the Bill. It was generally agreed that Casady would accompany Petitioner to Kansas City the following day (Sunday, February 8) and go to Petitioner's bank on Monday, February 9 (1 R. 113, 114).

There was no further contact between Petitioner and any of the parties except Casady, who later met Tager at Kansas City, Missouri. Petitioner never met Konys.

In the meantime, Konys had been discharged from the hospital and met Casady at Konys' home. As security for taking possession of the Bill, Casady gave Konys 40,000 or 45,000 shares of Nevco Blue-Jay stock worth 33 cents a share (1 R. 201).

Casady could not get a reservation on Petitioner's flight to Kansas City, so instead he flew to Los Angeles on Sunday evening where he contacted one Tim O'Mare in an unsuccessful effort to obtain money against the Bill (1 R. 261-262). He then flew to Kansas City, Missouri, arriving there at about 6:30 a.m., Monday, February 9. After checking into a hotel, he contacted Petitioner and

arranged to accompany him to the Twin City Bank at Kansas City, Kansas (1 R. 203-204). Casady testified that upon arriving at the bank, he sat in the lobby area while the Petitioner went into one of the offices and asked for the president. He had not arrived as yet. When the president did arrive, Petitioner went in to see him, leaving the Bill with another officer who was using the telephone. When Casady saw this, he became suspicious and left, going across the street to a phone booth. Petitioner came out of the bank, went over to Casady and said that there was apparently something wrong with the Bill; that the Secret Service was coming out and wanted to talk to Casady about it. Casady didn't wait, tried to get a cab, but was apprehended and placed under arrest a short distance from the bank (1 R. 205-207).

Tager was informed of his rights, signed a waiver, and gave an oral statement (1 R. 414-415).

At this point, the testimony of the witnesses relating to what took place at the bank, and the so-called exculpatory statements made by Petitioner, assumed grave importance since the Government's case and strategy was bottomed on showing the exculpatory statements to be false, and drawing into question the testimony of witnesses tending to be favorable to Petitioner by reading their grand jury testimony to them. The Government had to somehow show that the activities of the Petitioner while at the bank were consistent with guilt, a formidable job indeed, in view of the highly unnatural posture of such activities if Petitioner were in fact knowingly trying to pass a stolen $100,000.00 Treasury Bill.

Cyrus DeWolfe, assistant vice-president of the Twin City Bank, testified that the Petitioner was a customer of the bank and asked the witness several questions about a Treasury Bill he had in his possession. He wanted

to know if the witness could tell if the Bill was genuine. DeWolfe stated he would see what he could do. The Petitioner kept pressing the matter of checking its genuineness or whether it was a forgery or stolen. He insisted that he wanted it determined (2 R. 551-553). The Petitioner did not ask to cash the instrument nor did he ask about a loan. He did not inform the witness of the ownership of the Bill or how he planned to derive money from the transaction. The Petitioner did not know how to check out the Bill so it was the witness' suggestion to make a phone call so that the Bill be checked out. DeWolfe stated he would not have called unless the Petitioner had insisted. On cross-examination he stated that because Petitioner wanted the Bill checked, the phone call was made (2 R. 556, 557, 560).

Ralph Dirksen, vice-president and cashier of the bank, was shown the Bill shortly after Tager came into the bank. Tager had been talking to DeWolfe. While they visited, DeWolfe brought the Bill to Dirksen's desk and asked him how to determine if it was a genuine or stolen Bill. The witness replied that they could make some calls to the Federal Bureau of Investigation or the Federal Reserve to see if it was a stolen bill. The Petitioner then inquired of Dirksen as to how to obtain funds for a Treasury Bill. The witness had no doubt that the Petitioner wanted the Bill checked, both to ascertain if it was stolen and whether it was genuine. He wanted DeWolfe to check the Bill for him. It was considered doing his customer a favor by checking out the Bill (2 R. 566-567, 571, 574-575).

Shea Airey, a special agent for the Federal Bureau of Investigation, interviewed several people at the Twin City Bank, including the Petitioner. The Petitioner told him that he had flown to Las Vegas on Friday, February

6, and had registered at the Flamingo Hotel. Tager said he took the Bill to the bank and showed it to Mr. DeWolfe and had asked him to check the proper authorities to make sure the Bill was not a forgery or had not been stolen (1 R. 434-435). The Petitioner had asked for a fee of $5,000.00 for his services. He also said that he had told the man who represented the owner that his fee would be $8,000.00 for arranging a $30,000.00 loan (R. 2, 586-587).

The agent was told by the Petitioner that the Bill was brought to Kansas City to get a loan on it, and that at no time did the Petitioner tell the agent he was going to cash the Bill. The Petitioner said he would have to check to make sure the Bill was neither forged nor stolen. The Petitioner told the agent that he asked Mr. DeWolfe to check with the appropriate authorities to make sure the Bill was not a forgery and not stolen (2 R. 588-589).

Mr. DeWolfe told the agent that the Petitioner walked up to him, displayed the Bill, and asked him to check with the Secret Service to determine if the Bill was a forgery or had been stolen. Dirksen told the agent that he had known the Petitioner for some time. When the Petitioner walked up to his desk he said he was having Mr. DeWolfe check with the FBI on the legality of a United States Treasury Bill (2 R. 589-593).

Robert L. Rosi, another agent, testified that the Petitioner had told him on February 9, 1970, that he would receive a commission of $8,000.00 on a loan he derived, using the Bill as collateral, and that the amount of the loan was to be $30,000.00 (2 R. 595-596). The Petitioner told the agent that he would handle the loan providing the instrument was not forged or stolen, and that when he went into the bank he asked the bank to check it

out (2 R. 597). Both Mr. DeWolfe and Mr. Dirksen, when questioned by this agent, confirmed that the Petitioner had asked them to check with the Federal Bureau of Investigation to see if the Bill was not stolen (2 R. 598).

Richard J. Sosnika, an officer of the First National Bank of Nevada, testified as an expert on banking practices in Las Vegas, Nevada. Highly summarized, his testimony developed that no fee except a nominal fee is charged to handle treasury bills, or that in the event they didn't handle an item at their bank, the fee would probably be from $25.00 to $50.00. No attorneys are generally used in such transactions (1 R. 523, 2 R. 549).

Vernon R. George, assistant manager of the Flamingo Hotel, testified that the records of the hotel did not indicate that Petitioner was registered at that hotel during the period of February 6 through February 9, 1970 (1 R. 439-446).

Konys, the co-defendant, testified on his own behalf and generally denied any knowledge relating to the Treasury Bill and the accusations inherent in the testimony of Casady. Of course, he did not know Tager (2 R. 633-688).

VI.

ARGUMENT

A. In the area of pretrial discovery in criminal cases, should the Court clarify the apparent conflict between its holding in Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and 18 U.S.C. Sec. 3500, as amended in 1970, the statutory version of the so-called Jencks Rule, or at least delineate an accommodation between Brady and the Jencks Act? As a subsidiary question fairly comprised therein, was it error of reviewable dimensions for the trial court to deny pretrial access to grand jury testimony of key witnesses who testified at the trial which would have disclosed evidence favorable to the defendant, and which would have enabled the defendant to prepare for trial in such a manner so as to counteract intolerably unfair tactics on the part of the Government with respect to these witnesses?

B. On the question of when a defendant is entitled to production of Brady material, should not the Court clarify whether pretrial timing will be the rule, or whether Brady is to be coordinated with 18 U.S.C. 3500, thereby permitting the statute to qualify the apparent holding of Brady so that favorable material need not be produced until a witness has testified on direct examination? As subsidiary questions fairly comprised therein, and of necessity closely related thereto, if Brady is to have continued vitality, who decides whether evidence is favorable to the defendant; can such evidence always be discovered in the absence of an open file system; and does the term "favorable" exclude evidence which may be unfavorable, but which may also be of inestimable value to a defendant taking into consideration the peculiar facts of the case?

The Court's decision allowing disclosure in a limited sense in *Jencks* v. *United States*, 353 U.S. 657, 77 S.Ct. 1007, 1 L.Ed.2d 1103 (1957) was quickly followed by congressional codification of the rule,[5] which has become generally known as the Jencks Act. It provides generally that no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness shall be the subject of subpoena, discovery, or inspection until the witness has testified on direct examination in the trial of the case. A 1970 amendment extends the reach of the statute to statements made by a witness to a grand jury. Rule 16(b) of the Federal Rules of Criminal Procedure provides that the rule does not authorize the discovery or inspection of reports, memoranda, or other internal documents made by Government agents in connection with the investigation of the case, or of statements made by Government witnesses to agents of the Government, except as provided in 18 U.S.C. Sec. 3500.[6] It would appear that the plain unequivocal language of the statute and rule conclusively prohibits the production of the material mentioned therein prior to trial. However, the Jencks Act and Rule 16(b), if literally interpreted, conflict head-on with the Court's subsequent holdings in *Brady* v. *Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and *Dennis* v. *United States*, 384 U.S. 855, 86 S.Ct. 1840, 16 L.Ed.2d 973 (1968).[7]

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5. 18 U.S.C. Sec. 3500.

6. Rule 16(b): "Other books, papers, documents, tangible objects or places—* * *. Except as provided in subsection (a) (a), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation and prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C. Sec. 3500."

7. Both *Brady* and *Dennis* ante-date the 1970 amendment which extends the statutory procedure of 18 U.S.C. Sec. 3500 to grand jury testimony, an obvious effort on the part of Congress to blunt the effect of *Dennis*.

Brady requires the production of material favorable to the defense, while *Dennis* makes it mandatory that prior grand jury statements of witnesses called by the Government be made available when the defendant had demonstrated a particularized need for them, i.e., impeachment of witnesses, refreshing of recollection, and testing of credibility. In both cases due process considerations were involved and the right of a defendant to a fair trial. But the Jencks Act and Rule 16(b) provide for *when* the production is to be made, while *Brady*, as well as *Dennis*, are silent on the question of timing. Which prevails? This conflict has never been resolved, and if *Brady* in particular is to have any gloss whatsoever, its scope must be broadened and clarified, and a clear demonstration given of its effect on 18 U.S.C. 3500 and the 1970 amendment, and whether there can be an accommodation.

The successful operation of the adversary system as a fact-finding device depends on the capacity of each adversary to present evidence favorable to its case and to rebut evidence of his opponent. In criminal cases, perhaps the most significant disparity between the Government's capacity to prosecute and the defendant's capacity to defend derives from the Government's vastly superior ability to discover information concerning the alleged crime, to conduct investigations that the defense, in most cases at least, has neither the resources nor the investigative tools to duplicate.[8] While it has been suggested that it might be possible to reduce this disparity by providing public defender programs with the resources necessary to locate evidence favorable to the accused, a more efficient remedy

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8. Brennan, J., The Criminal Prosecution: Sporting Event or Quest for Truth, 1963 Wash. U. L.Q. 279, 286; Goldstein, the State and the Accused: Balance of Advantage In Criminal Procedure, 69 Yale L.J. 1149, 1172-98 (1960); Note: The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant, 74 Yale L.J. 136, 145-147 (1964).

appears to be to place the results of government investigation in the hands of the defense. It has been suggested that this would eliminate costly duplication of investigative efforts.

Brady held that a criminal defendant has a constitutional right of access to some of the information in the prosecutor's files. *Brady* has been thought to have left open a number of questions such as whether the defendant must request the information, which was done here, at what point in the criminal proceedings the information must be disclosed, and what constitutes suppression. We submit that the answers to the last two questions should be obvious: Disclosure should be made early in order to avoid a possible trial, and in any event, to give the defendant an opportunity to prepare, but *Brady* doesn't say this. As to what evidence should be disclosed, *Brady* is clear as far as it goes, but did not go far enough. For example, what about unfavorable evidence that would be of great value to the defense if known before trial? This is the case at bar.

Pyle v. *Kansas,* 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214 (1942), was *Brady's* harbinger in that it held that suppression of evidence was a deprivation of defendant's constitutional right to a fair trial. The importance of a request for such material, which would contemplate a pretrial request, is emphasized and thus approved in *Moore* v. *Illinois,* 408 U.S. 786, 92 S.Ct. 2562, 33 L.Ed.2d 706 (1972).

While the timing of the request was not spelled out in *Brady,* it appears that the material would be of little value unless obtained prior to trial. It is noted that the American Bar Association's standards relating to the prosecution's functions and the defense's functions under Sec. 3.11, specifies disclosure "at the earliest possible opportunity".

The critical inquiry posed to each court that has had this problem before it, and this is a potential problem in every criminal case, relates to what is required in order to insure a fair trial. As one court has noted, if evidence is to be of any use to the defendant at all, it must "be made available far enough in advance of trial to allow him sufficient time for its evaluation, preparation and presentation".[9] Most evidence is of particular value in pretrial preparation. Questioning of witnesses may lead to the discovery of material evidence. Weaknesses in the prosecution's case may be exploited through research. Any favorable evidence may be strengthened by corroboration discovered by means of additional investigative work. In short, the whole theory and presentation of the defense may be revised. The case for pretrial disclosure becomes more imperative when there is presented the possibility of dismissal prior to trial. Perhaps the holding in *United States* v. *Cobb*, 271 F.Supp. 159, 163 (S.D.N.Y. 1967) is what is required in the *Brady* context. Here, the court held that evidence of such a nature as delaying disclosure would prevent defendant from effectively using it at the trial must be turned over before the trial, and if it is not, the court may grant a motion for a mistrial. Does this go far enough? This is the critical question presented to the Court because of *Brady*, and should be resolved.

The same considerations apply to *Dennis* within the more narrow grand jury testimony context.

Turning to the situation in the case at bar, the defendant moved for the statements made before the grand jury

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9. *United States* v. *Partin*, 320 F.Supp. 275 (E.D. La.). See also *Hamric* v. *Bailey*, 386 F.2d 390 (4 Cir. 1967); *United States* v. *Cullen*, 305 F.Supp. 695 (E.D. Wis. 1969), affirmed 454 F.2d 386 (7 Cir. 1971); *United States* v. *Ball*, 49 FRD 153 (E.D. Wis. 1969); *United States ex rel. Meers* v. *Wilkins*, 326 F.2d 135 (2 Cir. 1964).

by named witnesses, all of whom later testified (3 R. 6). Numerous and particularized reasons were given. The motion was summarily denied (3 R. 30). Incongruously, the court granted the Petitioner's motion to compel disclosure of evidence favorable to him on the issue of guilt as required by *Brady* (3 R. 31). The decision as to what is favorable was left to the Government. This peculiar burden is the result of another of the unanswered questions left by *Brady*: Who is to make the decision as to what is or is not favorable to defendant? The Petitioner received the grand jury testimony during the trial within the Jencks Act context—not that of *Brady*.

Four government witnesses, all of whom testified favorably for the Petitioner on key points, were routinely and systematically impeached by the prosecution by testimony given before a grand jury a year and more after the event, without being permitted to refresh their recollections, without reviewing statements and memoranda of the federal officers, and while under cross-examination. They were then called to testify at the trial at a still later date and again were not interviewed or given an opportunity to see their grand jury testimony or the statements given to federal officers. The prosecution deliberately blunted or destroyed favorable evidence by permitting lapse of time to dim the memory of these witnesses, and then subject them to two harrowing examinations before a grand jury and a petit jury, thus, albeit cleverly, destroying their value to Petitioner. If Petitioner had had access to their statements to the agents and all of the grand jury testimony, he could have prepared to rehabilitate these witnesses by refreshing their recollections from statements which were part of the *res gestae*, and whatever other steps became necessary after a review of their grand jury testimony. As it was, the Government literally had a field day by im-

peaching favorable witnesses,[10] then turning what was left over to the Petitioner.

For example, Rasmussen testified that he interpreted Casady's comments to him relating to the Bill as meaning that it would have to be taken to a bank, and not that it was "hot". Casady, the witness thought, did not know whether it was "hot" or not (1 R. 101, 104). The prosecution then turned to the grand jury testimony and led the witness to admit that he had on August 5, 1971, said he interpreted Casady's "response" to be that the bill was hot and that the witness indicated there was something wrong about it (1 R. 107). The conversation took place on February 6, 1970.

Fihn was called by the Government and testified that Petitioner was skeptical about the Bill, and stated that it would have to be very thoroughly checked into (1 R. 500). He also testified that the Petitioner wanted to know why the Bill couldn't be taken care of in Las Vegas, rather than take it to Kansas City. Two reasons were given: The divorce action between Konys and his wife, and the difficulty in obtaining loans in Las Vegas (1 R. 501). The witness explained his own personal difficulties with Las Vegas banks (1 R. 503). Again, the prosecutor went to the grand jury testimony which tended to show that the witness actually believed that the Bill could be borrowed against (1 R. 505, 507). Even though the witness tried to explain that this was his opinion at the time of the grand jury proceedings (August 1971) and not at the time of his participation in the alleged events (February 7, 1970), the damage was done. The favorable effect of this crucial evidence was thoroughly demolished (1 R. 505-508).

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10. The receiving of the evidence without foundation, as substantive evidence, is still another error to be hereinafter presented.

Dirksen, the banker, a witness of impeccable integrity, testified that Petitioner did not tell him he was to get anything out of the transaction. The only conversation with the Petitioner involved the genuineness of the Bill (2 R. 569). However, again referring to the grand jury transcript, the prosecutor pointed out that the witness had there stated that the Petitioner was to get $5,000.00 or $10,000.00, and he believed it was $10,000.00, for helping to get the Bill *cashed* (2 R. 570).

Barnes, like Fihn, testified that Petitioner wanted to know why the money was not borrowed in Las Vegas—a very crucial point. Barnes told Petitioner that he would not be able to get any money on it in Las Vegas (1 R. 471). He explained in detail the difficulties involved. The prosecutor referred to the witness' grand jury testimony to the effect that he had not discussed these matters with the Petitioner and that the Petitioner had stated flatly that he would like to take the Bill to his bank in Kansas City and have the bank check it (1 R. 474). Also, reading the testimony in substantive form, it was shown that at the time of the grand jury investigation, the witness didn't know if it would be hard to place the loan in Las Vegas (1 R. 474, 475, 477).

The prosecutor adroitly read a series of questions and answers and then asked if the witnesses recalled them and if they were true or false (1 R. 476, 477). This was impeachment in its most basic form.

In *Dennis*, it was said:

> "The testimony of the four witnesses (grand jury) concerned conversations and oral statements made in meetings. It was largely uncorroborated. When the question of guilt or innocence may turn on exactly what was said, the defense is clearly entitled to all

relevant aid which is reasonably available to ascertain the precise substance of the statements.

* * *

"A conspiracy case carries with it the inevitable risk of wrongful attribution of responsibility to one or more of the multiple defendants. See, e.g. *United States* v. *Bufalino*, 285 F.2d 408, 417-418 (C.A. 2d Cir. 1960). Under these circumstances, it is especially important that the defense, the judge and the jury should have the assurance that the doors that may lead to truth have been unlocked. In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact. Exceptions to this are justifiable only by the clearest and most compelling considerations. For this reason, we cannot accept the view of the Court of Appeals that it is 'safe to assume' no inconsistencies would have come to light if the grand jury testimony had been examined. There is no justification for relying upon 'assumption'."[11]

This testimony was of the gravest importance since it involved three exculpatory statements by Petitioner claimed to be false, and strongly relied upon by the Government to prove guilt.[12]

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11. 384 U.S. at 873, 874, 86 S.Ct. 1850, 1851.

12. The Petitioner made four statements claimed by the Government to be falsely exculpatory and therefore admissible to show consciousness of guilt: (1) He stayed at the Flamingo Hotel at Las Vegas (made to an agent); (2) He took the Bill to Kansas City because he couldn't get money on it from Las Vegas banks (to grand jury); (3) He was to charge $2,500.00 to $3,500.00 as a commission, but he wasn't sure what the fee was to be (to grand jury and Dirksen); (4) He repeatedly stated to Rasmussen, Fihn, Barnes and Casady, while in the car, that he wanted to check out the Bill, and, of course, asked the bank officials to do so. All of the witnesses initially substantiated the truth of these state-

(Continued on following page)

Furthermore, these witnesses testified to other details which were most favorable to Petitioner. The Government could not explain the Petitioner's activities at the bank which were entirely inconsistent with that of a thief. Thus, by the simple means of impeachment, the probative value of Petitioner's activities as testified to by these witnesses, was inordinately and unfairly diluted. The production of this grand jury testimony prior to trial along with other statements of witnesses, including those made to FBI agents, would have given the Petitioner a chance to offset this impeaching evidence by careful preparation and planning.

Since *Brady* the Court has viewed pretrial discovery on an *ad hoc* basis, without drawing any definitive conclusions which would be of assistance to trial courts. For example, the Court recently expanded *Brady* (without reference to 18 U.S.C. Sec. 3500) to include a promise to a key prosecution witness that he would not be prosecuted. The court held that evidence of the promise was material since it affected the credibility of the witness, and non-disclosure violated the *Brady* rule of disclosure of evidence favorable to the defendant. *Giglio* v. *United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). It is submitted that the withholding of grand jury testimony which would impeach favorable key witnesses falls in the same category as the *Giglio* non-disclosure proscription.

It is suggested that *Brady* calls for broad discovery while *Dennis* removes secrecy from grand jury proceedings. *Brady* is the more important case here, and its principles more far-reaching. But, how far do these principles ex-

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Footnote continued—

ments until the prosecutor started his impeachment. Serious questions of admissibility also arose since it seemed clear that the exculpatory statements did not relate to the corpus delicti. *United States* v. *McConney,* 329 F.2d 467 (2 Cir. 1964).

tend? What about 18 U.S.C. 3500? Why not full discovery, or the open file system such as is in use in a number of states?

We submit that the Court now allow full discovery. It has this power since due process is involved, and not congressional intention as demonstrated by the provisions of the Jencks Act, but which are not cast in constitutional terms. *United States* v. *Augenblick*, 393 U.S. 348, 356, 89 S.Ct. 528, 533 (1969).

All experienced trial attorneys must conclude that the courts are conservative in the granting of pretrial discovery in criminal cases. This is an absurdity. There is no justification for broad discovery in civil cases, and limiting discovery in criminal cases where a person's liberty is at stake.

C. Does the record in this case reflect such utter, complete, and legally embarrassing lack of proof, so as to invite the Court's summary intervention?

We are cognizant of the fact that as a rule the Court cannot concern itself with cases where pure questions of fact are concerned or attempt to second-guess the trier of fact. We could not begin to estimate the number of people convicted on an illegally impermissible quantum of evidence who have been denied review by the Court. This case probably occupies a similar uncomfortable position. However, the paucity of proof in this case impels us to briefly summarize the evidence used to convict.

The Petitioner arrived in Las Vegas on Friday, February 6, 1970. The next day he was sitting in an office with Barnes and Fihn discussing business. A call comes in from Rasmussen to Barnes asking if Barnes could loan money against a $100,000.00 Treasury Bill. Barnes is un-

able to do so, and points out that there was a man in his office who may be able to so do. A short conversation then ensues over the speaker phone. Nothing incriminating is said, although there was some confusion over whether Petitioner asked why a Las Vegas bank couldn't handle the matter, and the question of a fee. The conversation at the hospital was between Konys and Casady and the alleged gestures of Konys took place the day before the office conversation. It cannot be related to Petitioner.[13]

Arrangements are made for the group, including Petitioner and Casady, to go to the hospital that afternoon (Saturday, February 7). Casady goes in and comes back with a Treasury Bill with a $100,000.00 face value. Inspection indicates it is genuine. Petitioner then takes down its serial number and asks why the loan must be made in Kansas City. Answer: No bank in Las Vegas will lend that kind of money. Something was also said about Konys wanting to conceal his assets because of a divorce case. There is no evidence that Petitioner knew of any custom in Las Vegas relating to loans on such treasury bills except what was told him by members of the group.

Arrangements are then made for Casady to go to Kansas City with the Petitioner in order that Petitioner may deal with his own bank. He is to earn a commission, although the amount was never made clear.[14] Casady cannot obtain reservations on Petitioner's flight, so he flies to Los Angeles and tries to get money on the Bill through

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13. Casady claimed that Konys shook the Bill "like it might be one that would be a little hot to hold." (1 R. 187). This is claimed to have taken place on Friday, February 6, although the conversation and gesticulating took place one day before the Petitioner was in any way concerned with the Bill. The Court, over objection, let the evidence in.

14. Testimony varied from $2,500.00 to $10,000.00.

a certain car dealer. Unsuccessful, he flies to Kansas City on Monday morning, February 9, meets Petitioner, whom he calls, and with the Petitioner, proceeds to the Twin City Bank in Kansas City, Kansas.

Petitioner, a customer at the bank and apparently well known to the officials, gives the Bill to an officer (DeWolfe), asking him to check to see if it was genuine, and not stolen. While the necessary calls are being made, the Petitioner chats with Dirksen, the bank's vice-president, and tells him about the Bill and the fact that DeWolfe is checking on it.

While Petitioner is so engaged, Casady leaves the bank and goes across the street to a phone booth. Petitioner joins him a few minutes later and tells him there are problems. The Secret Service is on its way, and wants to speak to Casady. Petitioner is calm and acts as though this is a routine affair.

Casady tries to get away and is taken into custody a block away. The Petitioner signs a waiver, tells his side of the story, and the matter is over, until the grand jury takes it up a year to eighteen months later.

We submit that this evidence falls so far short of proving the charges of conspiracy, possession and transportation, so as to be almost embarrassing. This posture calls for summary reversal by the Court.

D. Did not gross and extreme prejudice result to the Petitioner by the Government's calling of favorable witnesses for the Petitioner and then proceeding to impeach them by the use of grand jury testimony (unavailable to Petitioner prior to trial) without laying a proper foundation for such impeachment, and by the failure of the court to give cautionary instructions? As a subsidiary question fairly comprised therein, is there a conflict here with the Court's holding in Bridges v. Wixon, 326 U.S. 135, 65 S.Ct. 1443 (1945) on the use of impeachment material as substantive evidence?

We must score the tactics of the Government prosecutor who cross-examined his witnesses before the grand jury and then proceeded to impeach those same witnesses during the trial with the grand jury cross-examination, without permitting them to examine such grand jury testimony. We are hopeful that this does not set a precedent. At the time of trial, the witnesses, without exception, reiterated their original statements given to federal officers shortly after the arrest of Casady, which completely repudiated the testimony given before the grand jury elicited, as heretofore stated, by cross-examination, and without allowing access to their statements to the investigating officers.[15]

The rule is well established that a party is allowed to impeach his witnesses only when he can establish the elements of "surprise" and "damage". *United States* v. *Goings*, 377 F.2d 753 (8 Cir. 1967); 3 Wigmore, *Evidence*, Sec. 904, 1043 (3rd Ed.). No such showing was made by the Government in this case, nor was any attempt made to do so.

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15. Prior inconsistent statements of five Government witnesses (made either before the grand jury or to agents) were introduced by the Government: Barnes (1 R. 472-478), Casady (1 R. 186, 207), Dirksen (2 R. 570), Fihn (1 R. 503-509), Rasmussen (1 R. 106-108).

Also, prior statements of a witness are inadmissible only to discredit the witness and are not competent as substantive evidence of the facts to which the prior statements relate. Such statements are considered pure hearsay. *Bridges* v. *Wixon,* 326 U.S. 135, 65 S.Ct. 1443, 89 L.Ed. 2103 (1945); *United States* v. *Barnes,* 319 F.2d 291 (6 Cir. 1963); *Brooks* v. *United States,* 309 F.2d 580, 582 (10 Cir. 1962); 3 Wigmore, *Evidence,* Sec. 1018 (3rd Ed.). The error was compounded when the trial court gave no limiting instruction. The law is clearly established that where the evidence is admissible for one purpose, but inadmissible for another, a limiting instruction must be given. *Sprinkle* v. *Davis,* 111 F.2d 925 (4 Cir. 1940). *United States* v. *Barnes,* supra; *Valentine* v. *United States,* 272 F.2d 777 (5 Cir. 1959).

The Court has recently considered this evidentiary question, but in a state setting. In *California* v. *Green,* 399 U.S. 149, 90 S.Ct. 1930 (1970), relied upon by the Government below, the Court overturned a California Supreme Court decision declaring unconstitutional a state statute providing that hearsay evidence of the type involved here (grand jury testimony) could be received in criminal cases. The Court did so with reservations, however. But, this was a state case, without precedential value here. The so-called orthodox rule is still followed by the Court. In *Bridges* v. *Wixon,* supra, it was held that an out-of-court statement could be admitted for impeachment purposes *but not as substantive evidence in a criminal case.* The record clearly establishes that the evidence so adduced for impeachment purposes was not so limited, and went in as substantive evidence, thereby creating a conflict with *Bridges,* the latest utterance of this Court on the subject. The materiality of the statements cannot be disputed since what was favorable to the Petitioner was impeached; as a

result, the impeaching evidence became substantive evidence.[16]

E. Was the Petitioner prejudiced by the fact that the Government, in a simple case, which had all the facts shortly after the arrest of an alleged co-conspirator, waited eighteen months before seeking an indictment? As a subsidiary question fairly comprised therein, was the defendant prejudiced under the standard delineated in United States v. Marion?[17]

Marion teaches us that pre-indictment delay by the Government does not violate the Due Process Clause, and that the Sixth Amendment guarantee of a speedy trial is applicable only after a person has been accused of a crime. The statute of limitations is deemed to be an adequate safeguard. However, the Due Process Clause may provide a basis for dismissing an indictment if it can be shown that the delay was intentional on the part of the Government to gain a tactical advantage, or that there was actual prejudice to a defendant. The Court has seldom had the question before it in post-arrest cases, and only twice on pre-arrest or pre-indictment cases.[18]

Justice Douglas, in a concurring opinion in *Marion*, joined by Justices Brennan and Marshall, was of the opin-

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16. The impeaching evidence accused Petitioner of not repeatedly saying he would have to check it out; of contemplating a fee of as high as $10,000.00; that the Petitioner did not ask why the Bill could not be handled in Las Vegas while at Barnes' office; that certain witnesses did not have any doubts that the Bill could be handled in Las Vegas; the amount that Casady would receive as a profit would be anything over $30,000.00 (a pre-conspiracy statement as far as the Petitioner was concerned); and Rasmussen's belief from the beginning that the Bill was hot. All of this evidence was a complete turnabout insofar as the Petitioner was concerned, and devastating to his defense.

17. 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971).

18. See also *Dickey* v. *Florida*, 398 U.S. 30, 90 S.Ct. 1564, 26 L.Ed.2d 26 (1970).

ion that the considerations that are relevant in post-indictment delays are just as relevant as in pre-indictment delays. He pointed out that the English courts historically took into consideration delay in the issuance of an information, and that the English common law, with which the framers of the Constitution were familiar, conceived a criminal prosecution as being commenced prior to the indictment.[19] He added:

> "Undue delay may be as offensive to the right to a speedy trial before as after an indictment or information. The anxiety and concern attendant on public accusation may weigh more heavily upon an individual who has not yet been formally indicted or arrested for, to him, exoneration by a jury of his peers may be only a vague possibility lurking in the distant future. Indeed, the protection underlying the right to a speedy trial may be denied when a citizen is damned by clandestine innuendo and never given the chance promptly to defend himself in a court of law. Those who are accused of crime but never tried may lose their jobs or their positions of responsibility, or become outcasts in their communities.
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> "The impairment of the ability to defend oneself may become acute because of delays in the pre-indictment stage. Those delays may result in the loss of alibi witnesses, the destruction of material evidence, and the blurring of memories. At least when a person has been accused of a specific crime, he can devote his powers of recall to the events surrounding the alleged occurrences. When there is no formal accusation, however, the State may proceed methodically to build its case while the prospective defendant proceeds to lose his." (404 U.S. 330, 331, 92 S.Ct. 468, 469).

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19. 404 U.S. at 329, 92 S.Ct. at 467-468.

However, that case was a complex one, and in the absence of a showing of deliberate delay or real prejudice, Justice Douglas saw no reason to invoke the Sixth Amendment. Justice Brennan put it more candidly:

> "If this were a simpler crime, I think the British precedent which I have cited would warrant dismissal of the indictment because of the speedy trial guarantee of the Sixth Amendment." (404 U.S. at 335, 92 S.Ct. at 470-471).

The case at bar is a simple one: One Treasury Bill is involved with pyramided charges of possession, transportation, and conspiracy to possess and transport. The events spanned a period from about noon on February 6, 1970, to early Monday morning, February 9, 1970. Insofar as Petitioner is concerned, the events started at approximately 12:30 to 1:00 P.M. on February 7, 1970, while he was in Barnes' office, and terminated sometime after 9:00 A.M. on February 9, 1970, when Casady was taken into custody, a period of less than 45 hours. If we take into consideration the activities of the two unindicted alleged co-conspirators, Casady and Rasmussen, the span is about 72 hours. We submit that this case meets the criterion of simplicity suggested by *Marion*. Casady was immediately placed under arrest, but never charged. In fact, the case against him was dismissed, and he was later incarcerated in a Texas correctional institution on another charge when called upon to testify. There is evidence in the record that his whereabouts were known at all times by the Government.

Konys' home was searched shortly after Casady's arrest, and all of the key witnesses were interviewed. Nothing really remained to be done. With Casady in custody, the Bill in the Government's possession and its origin known, and Konys, Rasmussen, Barnes, Fihn and Peti-

tioner either in Kansas City or Las Vegas, there was absolutely no impediment to immediate prosecution. What happened? It was not until January, 1971, and the first week of August, 1971, that the case was brought before the grand jury and key witnesses subpoenaed and examined. Periods of a year and eighteen months had elapsed. Was this deliberate strategy on the part of the prosecutor of the so-called Strike Force of the Justice Department, or such gross carelessness or inexcusable procrastination so as to amount to the same thing? We submit that the taking of witnesses' statements immediately after Casady's arrest, and then calling these witnesses a year or eighteen months later, not refreshing their recollection, and then cross-examining them, hardly comports with the idea of fairness, or that the Government was relying on the lapse of time to dim the memories of witnesses who would no longer have any reason to recollect minute details. The impeachment of these same witnesses at the trial on crucial points by the use of the grand jury testimony followed as a natural, and we suggest, calculated result of such tactics.

The Petitioner himself, who had given an oral statement, was suddenly subpoenaed to appear before the same grand jury. He waived his rights and testified. Understandably, his memory had faded on such points as the number of times he stated he wanted the Bill checked, and the amount of his commission or fee. These two areas later turned up at the trial when the Strike Force prosecutor read questions and answers into the record as false exculpatory statements indicating consciousness of guilt. The delay had destroyed Petitioner's defense and his witnesses.

We submit that the delay was inexcusable, appears to be deliberate, and resulted in serious prejudice to Peti-

tioner's defense. The case being simple, it is urged that the delay has assumed constitutional dimensions in violation of Petitioner's Sixth Amendment right to a speedy trial. It is further urged that this is the pre-indictment delay contemplated in *Marion* as justifying close scrutiny by the Court. We are aware that this type of case should probably be decided on an *ad hoc* basis, there being no previously suggested yardstick available, or perhaps even desirable. Nevertheless, such a basis for decision does not diminish Petitioner's constitutional rights to a speedy trial and the need for review, as well as further clarification of the reach of *Marion*.

Petitioner had moved at the omnibus hearing for dismissal for want of a speedy trial (3 R. 28). The motion was denied (3 R. 32).

F. Was the granting of immunity to an unindicted co-conspirator in open court in front of the jury, after he had taken the Fifth Amendment, seriously prejudicial to the defendant, when it was known to the Government in advance of trial that the witness would take the Fifth Amendment?

The Court has said that the prosecutor may strike hard blows, but not foul ones.[20] However, in this case, the inordinate delay, the impeachment of the Government's own witnesses who would have made out a strong defense for the Petitioner, the use of irrelevant and trivial allegedly false exculpatory statements, the failure to produce the grand jury testimony of potentially helpful witnesses, deliberate and artfully tricky cross-examination of the Government's own witnesses in order to impeach them and their favorable testimony, and finally, permitting the un-

20. *Berger* v. *United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314.

indicted alleged co-conspirator Casady to take the Fifth Amendment in the presence of the jury, all combined to paint a sorry picture of a Government prosecutor who had to have his conviction at all costs.

There was no need to allow Casady to refuse to testify in open court, and shortly thereafter announce that immunity had been granted (1 R. 161-176). This could only serve to place undue emphasis upon this witness' testimony to the detriment of the Petitioner. The Government had a friendly witness who had written to prosecutor Cornwell, informing him of the visit of defense lawyers, and of his intention to take the Fifth Amendment. In the letter dated October 25, 1971, he said, in part:

> "Dear Gary: Attorneys Powell and Feiring along with a court reporter paid me a visit this afternoon. *So you will know I was intending to take the 5th I didn't tell them what your reaction would be except that I had told you the same.*
>
> * * *
>
> "They are going strong on the premise that I didn't tell Taeger [sic] the bill was hot.
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> * * *
>
> "*They wanted to know if I testified at the Grand Jury. I lied.* They wanted to take down a statement. I refused. Konys is going to try to discredit me by calling me an alcoholic.
>
> * * *
>
> "I'm sure they have Rasmussen in their pocket." (3 R. 105) (Emphasis supplied).

No reasonable explanation appears as to why the arrangements for granting immunity were not made prior to trial so as to avoid the taking of the Fifth Amendment by an alleged co-conspirator under the circumstances which

could only result in prejudice to the Petitioner. In fact, a reading of the statements of Cornwell that he had just called the Justice Department in Washington to obtain permission to grant immunity, and that a letter would be received forthwith, casts grave suspicions on his veracity. Obviously, the Government had already arranged for immunity, but elected to obtain a serious tactical advantage over the Petitioner by permitting Casady to claim his constitutional rights in open court (1 R. 161-176).

CONCLUSION

Judge Simon E. Sobeloff, when Solicitor General, elaborated on the famous inscription on the walls of the Department of Justice: "The United States Wins Its Point Whenever Justice Is Done to a Citizen in the Courts", when he said:

> "The Solicitor General is not a neutral, he is an advocate; but an advocate for a client whose business is not merely to prevail in the instant case. My client's chief business is not to achieve victory but to establish justice. We are constantly reminded of the now classic words penned by one of my illustrious predecessors, Frederick William Lehmann, that the government wins its point when justice is done in its courts."[21]

The trial of this case is a sorry caricature of such lofty ideals. The artful trial tactics of the prosecutors, pre-indictment delay, the use of improper evidence, the failure to produce, among other matters, seriously impaired the Petitioner's ability to defend himself. Such matters

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21. Address before the Judicial Conference of the Fourth Circuit on June 29, 1954.

are particularly urgent and call for even closer scrutiny because of the weak case against Petitioner. Our system of justice would indeed be in a sad state if prosecutors were allowed additional liberties in order to bolster a sagging set of facts.

Additionally, the scope of *Brady* must eventually be determined, and whether its principles can be accommodated with the Jencks Act.

And, lastly, the Court has an opportunity to look again at the speedy trial concept within the pre-indictment framework where a case is simple and prejudice is shown, and is co-joined with a deliberate or at least an inexcusable delay on the part of the Government in bringing this case before a grand jury and obtaining an indictment.

It is respectfully requested that the Court issue a Writ of Certiorari to the Court of Appeals for the Tenth Circuit, or in the alternative, that the Court grant summary reversal and direct that this case be dismissed.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MARCH, 1973, TERM

No. 72-1418

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

A. HENRY TAGER,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF Kansas
(D. C. No. KC-CR-1489)

(Filed May 14, 1973)

Before BREITENSTEIN, HILL and McWILLIAMS, United States Circuit Judges.

HILL, Circuit Judge.

Tager appeals from conviction and sentence by the United States District Court for the District of Kansas following guilty verdicts by a jury on three counts of an indictment. One count charged him with having conspired, in violation of 18 U.S.C. § 371, with a named co-defendant and two named but unindicted co-conspirators to transport in interstate commerce a United States trea-

sury bill with a face amount of $100,000 knowing it to be stolen, in violation of 18 U.S.C. §§ 2314 and 2315. Counts 2 and 3 were substantive counts under the last two named statutes. Tager and the co-defendant, Konys, were tried jointly, and both were convicted.

The evidence on behalf of the prosecution established that David Casady, an unindicted co-conspirator, came to Las Vegas on February 6, 1970. He contacted Konys, who was at that time confined to a local hospital. Casady testified, after being granted immunity, that Konys had shown him the $100,000 treasury bill at the hospital. He testified that when Konys had produced the treasury bill, "he shook the bill like it might be one that would be a little hot to hold." From this Casady inferred there was a "stigma" attached to the bill. Konys requested that Casady attempt to obtain $25,000 against the bill. Casady then contacted an acquaintance in Las Vegas, Boyd Rasmussen, the other unindicted co-conspirator, about obtaining this amount for the treasury bill.

The next morning Rasmussen, in trying to find someone willing to lend the requested amount with the treasury bill as collateral, called the office of a local businessman, Gilbert Barnes. Barnes declined to make the requested loan, but advised Rasmussen there was a person in his office who could perhaps be of some assistance. Rasmussen was then introduced to the appellant Tager, who was in Las Vegas pursuing business with Barnes. The telephone conversation was then conducted through an amplification device in Barnes' office. The details of the transaction as related to Tager were that Rasmussen was representing Casady who was attempting to borrow $25,000 to $30,000 on the bill. There was also discussed at this time a five to eight thousand dollar "finder's fee" which would be paid to the person locating a place where the loan could

be obtained. Tager requested that he be allowed to see the treasury bill. It was agreed, and that afternoon Tager with four others, including Casady, drove to the hospital where Konys was confined. Casady entered the hospital and soon returned with the treasury bill which he showed to Tager and the other occupants of the car. After examining the bill, Tager stated that it looked genuine, to which Casady replied, "That's all that I can guarantee, is that it is authentic."

An agreement was reached whereby Tager would assist Casady in obtaining the loan at a Kansas City, Kansas, bank at which Tager had his personal banking accounts. At trial, conflicting explanations were offered as to the reason for handling the loan in the Kansas City bank. One explanation related an impossibility of securing that amount of funds from a Las Vegas bank, while another purported reason related to an attempted concealment of this asset pending a future divorce proceeding of one of the participants in the transaction.

Tager returned to Kansas City on Sunday, February 8, and was contacted the next day by Casady who had arrived in Kansas City that morning from California. Tager met Casady and the two of them proceeded to the bank. There is some evidence showing Tager suggested to the bank's officers that federal authorities be contacted for the purpose of establishing the genuineness of the bill. In any event, such an inquiry by bank officials revealed the treasury bill being presented by Tager to be part of a theft of treasury bills from a New York City bank approximately four months earlier.

Casady, who had left the bank when the federal authorities were called, was arrested down the street from the bank while waiting for a taxi to leave the area. Tager remained at the bank until the federal authorities arrived,

and after being informed of and waiving his Fifth Amendment rights, stated that he had obtained the treasury bill while in Las Vegas the previous weekend, that he had been asked to obtain a $25,000 loan using the treasury bill as collateral; that he was to receive a $5,000 fee for doing so; and that when the requested loan was later increased to $30,000 he had increased the amount of his fee to $8,000. In other testimony Tager denied that his fee was to have been either $5,000 or $8,000, but that it was "twenty-five to thirty-five hundred" dollars.

The assistant manager of a Las Vegas branch bank testified during the trial that a loan could be obtained in Las Vegas using the treasury bill as collateral; that attorneys are not used in treasury bill transactions; and that the usual fee charged by the bank for handling an unmatured treasury bill would be from twenty to fifty dollars, with fifty dollars as the maximum.

While at the bank, Tager additionally told the agents the name of the Las Vegas hotel at which he was registered on that weekend. The registration records were produced at trial, together with testimony of the hotel's assistant manager. These records bore no indication of Tager having been registered at the hotel.

Tager, after being advised of his rights, also testified before the grand jury that he had repeatedly stated that he was going to have the treasury bill verified as to its authenticity before he would have anything to do with the transaction. Rasmussen and Casady, however, testified that Tager had made no statements that he was going to contact federal authorities to verify the authenticity of the treasury bill.

Tager first asserts error in the trial court's denial of his motions pursuant to F.R.Crim.P. Rule 29 for judgment

of acquittal, contending there was insufficient evidence to establish that he knew the treasury bill was stolen. In reviewing the district court's refusal to direct a verdict of acquittal, this court must determine whether, viewing the evidence in a light most favorable to the prosecution, there was substantial evidence, together with reasonable inferences drawn therefrom, that would sustain the verdict.[1] We have carefully read and considered all of the evidence in the record and must conclude that the trial court did not err in refusing to direct a verdict of acquittal. There was sufficient evidence to support the verdict of the jury.

Tager next contends the trial court erred in permitting the introduction of evidence which was inconsistent with or contradictory to statements previously made by him. The alleged erroneously admitted evidence consisted of the hotel records indicating he had not been registered at the hotel; the evidence showing a lack of necessity of taking the treasury bill to Kansas City to obtain funds on it; the inconsistent and contradictory statements made by Tager regarding the amount of his fee in the transaction; and testimony that Tager had not made repeated declarations of his intent to have the bill authenticated by federal authorities. False exculpatory statements made by a defendant are admissible to prove consciousness of guilt and unlawful intent.[2] The evidence under attack here was properly admitted.

Appellant next argues the trial court prejudicially confined pre-trial discovery, particularly with regard to the testimony of other witnesses given to the grand jury. He contends the refusal of the trial court to order disclosure of the grand jury minutes denied him access to favorable

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1. United States v. Weiss, 431 F.2d 1402 (10th Cir. 1970).

2. United States v. Kilpatrick, 458 F.2d 864 (7th Cir. 1972); United States v. Pistante, 453 F.2d 412 (9th Cir. 1971).

information by which he could have both attacked the grand jury proceedings and better prepared for trial. Under the 1970 amendment to 18 U.S.C. § 3500, the defendant has no right to pre-trial discovery of statements made by government witnesses to the grand jury.[3] There was no error in refusing appellant's request for disclosure.

Complaint is also made that the 18-month delay between the date of the commission of the offense and the presentation of the evidence to the grand jury was a prejudicial delay. In United States v. Beitscher, 467 F.2d 269, 272 (10th Cir. 1972), we held "the rights of a defendant under the due process clause of the Fifth Amendment are not violated in the absence of a showing of actual prejudice resulting from the pre-indictment delay and that the delay was purposefully designed to gain tactical advantage or to harass the defendants." We do not believe either of these elements was present in this case.

Tager next maintains the trial court erred in permitting the prosecution to question its own witnesses regarding prior inconsistent statements which they had given in testimony before the grand jury. Appellant contends this was improper in that the prosecution was permitted to impeach its own witnesses, while at the same time confusing the jury, thereby gaining the conviction. We note that the government witnesses who were questioned with regard to their grand jury testimony each recalled having made the statement and confirmed the answers he had given were true. Grand jury testimony may properly be used for the purpose of refreshing the recollection of a witness.[4] The use of such testimony for this purpose rests

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3. United States v. Quintana, 457 F.2d 874 (10th Cir. 1972), *cert. denied*, ____ U.S. ____; 18 U.S.C. § 3500(a), (e) (3).

4. Collins v. United States, 383 F.2d 296 (10th Cir. 1967).

in the sound discretion of the trial judge.[5] We find no abuse of that discretion in the trial here.

Tager next contends the failure to disclose plea bargaining by the prosecution with the two named but unindicted co-conspirators who ultimately testified at trial requires reversal. *See* United States v. Harris, 462 F.2d 1033 (10th Cir. 1972). We note first there is no evidence in the record of prior plea bargaining by the prosecution in exchange for the testimony of either witness. However, Casady, in the presence of the jury in open court, claimed his Fifth Amendment privilege to refuse to answer questions. Court was recessed at that point until the prosecution received permission to grant immunity to this witness. Upon resumption of the trial, the jury was informed by the trial judge that the witness had been granted immunity from prosecution, and was additionally told that they were not to draw any adverse inferences or any inferences of guilt as to either of the defendants from this fact alone. The jury here was clearly instructed concerning the inducements for testimony of this witness, and those instructions must necessarily have been considered by them in reaching a verdict. With respect to the testimony of Rasmussen, the record does not reveal any prior inducements being made which would have been relevant in attacking his motive for testifying.

The jury, after having retired for their deliberations, requested that they be allowed to hear portions of the testimony of two of the witnesses. The trial judge felt that reading only portions of testimony would tend to unduly emphasize that part of the evidence, denied the request, and advised the jury that if they desired to have

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5. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); Collins v. United States, supra.

read the entire testimony of any of the witnesses, the request would be considered. The jury subsequently requested that they be allowed to hear the testimony of the co-defendant Konys. The request was granted, and the entire testimony of Konys was read to the jury in open court by the court reporter. Tager contends the trial court erred in allowing this testimony to be read back to the jury. He maintains this unduly emphasized that particular testimony, the effect of which was to prejudice him. In Tyler v. United States, 361 F.2d 862, 863 (10th Cir. 1966), we stated that "[i]t was within the sound discretion of the trial judge to determine whether the requested testimony should be read back to the jury. . . ." We find no abuse here of that discretion.

On oral argument, appellant abandoned the asserted trial error relative to the trial court's instructions. The merits of this argument are accordingly not considered.

The record in this case is voluminous, and during the course of our decisional process we have given careful consideration to all of the evidence and to the issues raised by the appellant. We are compelled to the conclusion that a fair trial was afforded to appellant, and the conviction must be AFFIRMED.

APPENDIX B

JULY TERM—AUGUST 28, 1973

Before Honorable Jean S. Breitenstein, Senior Circuit Judge, Honorable Delmas C. Hill and Honorable Robert H. McWilliams, Circuit Judges

No. 72-1418

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

A. HENRY TAGER,
Defendant-Appellant.

This matter comes on for consideration of the petition for rehearing filed by the appellant.

Upon consideration whereof, the petition for rehearing is denied.

/s/ Howard K. Phillips
Clerk

JAN 30 1974

MICHAEL RODAK, JR., CLERK

No. 73-694

In the Supreme Court of the United States

OCTOBER TERM, 1973

A. HENRY TAGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-694

A. HENRY TAGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of Kansas, petitioner was convicted of conspiring to transport a stolen United States Treasury bill in interstate commerce; receiving the same treasury bill; and transporting that bill, in violation of 18 U.S.C. 371, 2314, and 2315.[1] He was sentenced to imprisonment for five years, three months of which was to be served, the balance suspended and petitioner placed on probation for five years. The court of appeals affirmed his conviction in a comprehensive opinion (Pet. App. A.).

[1] A co-defendant, Knoys, was also convicted; he did not appeal.

Petitioner contends (1) that he was improperly denied pre-trial examination of grand jury testimony, (2) that the evidence was insufficient to sustain his conviction, (3) that the government improperly called witnesses favorable to petitioner and impeached them, (4) that he was denied his right to a speedy trial by virtue of an eighteen month delay between the commission of the offense and the return of the indictment, and (5) that the government improperly granted immunity to the unindicted coconspirator in open court after the witness had claimed his Fifth Amendment privilege.

In addition to setting out the factual background on which petitioner's conviction rests, the opinion of the court below, upon which we rely, fully answers each of these claims (Pet. App. A.).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1974.

U.S. GOVERNMENT PRINTING OFFICE: 1974

SUPREME COURT, U. S.
MAR 16 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-694

A. HENRY TAGER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING ON ORDER DENYING WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Additional Reasons for Granting the Writ Presented by Intervening Matter—

1. The trial court's instruction that the jury might infer from proof of possession in one state of property stolen in another that the possessor not only knew such property to be stolen but also transported it or caused it to be transported in interstate commerce, violates due process of law and is in conflict with the decision of this Court in Barnes v. United States, ... U.S. ....., 37 L. Ed. 2d 380, 93 S. Ct. ..... (1973) 4
2. The admission of evidence which was inconsistent with or contradictory to statements previously made by petitioner for the purpose of proving consciousness of guilt and unlawful intent, and instructing the jury that such evidence might be so received, does not comport with due process where such inconsistencies do not reach the corpus delicti of the crimes sought to be proved 10
3. The decision of the United States Court of Appeals for the Tenth Circuit conflicts with the prior decisions of this Court and of the various courts of appeal with respect to its affirmance of the trial courts' rulings on the admissability and use by the prosecution of prior inconsistent

statements to impeach or refresh the recollection of its own witnesses; such affirmance in the context of this case constitutes a sanction of such a departure by the trial court from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision; and petitioner was so prejudiced by said admission and use as to have been denied due process of law 15

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-694

A. HENRY TAGER,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING ON ORDER DENYING WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUPPLEMENTAL STATEMENT

Pursuant to Rule 58(2) of the Rules of the Supreme Court, petitioner respectfully submits the within Petition for Rehearing of the Court's Order denying certiorari in these proceedings entered February 19, 1974, calling the Court's attention to intervening circumstances of substantial and controlling effect, and to substantial grounds available to petitioner not previously presented.

ADDITIONAL QUESTIONS PRESENTED BY INTERVENING MATTER

1. Whether the trial court's instruction that the jury might infer from proof of possession in one state of property stolen in another that the possessor not only knew such property to be stolen, but also transported it or caused it to be transported in interstate commerce, violates due process of law and is in conflict with the decision of this Court in *Barnes* v. *United States*, ... U.S. ....., 37 L. Ed. 2d 380, 93 S. Ct. ..... (1973).

2. Whether the admission of evidence which was inconsistent with or contradictory to statements previously made by petitioner for the purpose of proving consciousness of guilt and unlawful intent, and instructing the jury that such evidence might be so received, comports with due process where such inconsistencies do not relate to or do not reach the corpus delicti of the crimes sought to be proved.

3. Whether the decision of the United States Court of Appeals for the Tenth Circuit conflicts with the prior decisions of this Court and of the various courts of appeal with respect to its affirmance of the trial court's rulings on the admissability and use by the prosecution of prior inconsistent statements to impeach or refresh the recollection of its own witnesses; whether such affirmance in the context of this case constitutes a sanction of such a departure by the trial court from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision; and whether petitioner was so prejudiced by said admission and use as to have been denied due process of law.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 18:

§ 371. *Conspiracy to commit offense or to defraud United States*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

United States Code, Title 18:

§ 2314. *Transportation of stolen goods, securities, moneys, fraudulent state tax stamps, or articles used in counterfeiting*

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; . . . . Shall be fined not more than $10,000 or imprisoned not more than ten years, or both. Sept. 28, 1968, Pub. L. 90-535, 82 Stat. 885.

United States Code, Title 18:

§ 2315. *Sale or receipt of stolen goods, securities, moneys, or fraudulent state tax stamps.*

Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of $500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken; or . . . .

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both. Oct. 4, 1961, Pub. L. 87-371, Sec. 3, 75 Stat. 800.

ADDITIONAL REASONS FOR GRANTING THE WRIT PRESENTED BY INTERVENING MATTER

1. The trial court's instruction that the jury might infer from proof of possession in one state of property stolen in another that the possessor not only knew such property to be stolen but also transported it or caused it to be transported in interstate commerce, violates due process of law and is in conflict with the decision of this Court in Barnes v. United States, ... U.S. ....., 37 L. Ed. 2d 380, 93 S. Ct. ..... (1973).

Petitioner was convicted on each of three counts of an indictment. Count I charged that petitioner and co-defendant Konys conspired with each other and with unindicted co-conspirators David L. Casady and Boyd Rasmussen to knowingly receive, transport and cause to be transported in interstate commerce a stolen United States

Treasury Bill with a face value of $100,000, in violation of 18 U.S.C. § 371; Count II charged that they caused the treasury bill to be transported from Las Vegas, Nevada to Kansas City, Kansas, in violation of 18 U.S.C. § 2314; and Count III charged that petitioner received the treasury bill, which was moving in interstate commerce, in violation of 18 U.S.C. § 2315.

A necessary and essential element of each of the charges was *knowledge* on the part of petitioner of the stolen character of the treasury bill. However, petitioner need not only have known that the bill was stolen in order to sustain the convictions. He must *also* have conspired to transport or cause it to be transported in interstate commerce;[1] he must *also* have actually caused it to be so transported;[2] and he must *also* have received it while moving as or while part of interstate commerce.[3]

In its instructions to the jury, the trial court charged that:

> ". . . *possession in one state of property recently stolen in another state,* if not satisfactorily explained *is ordinarily a circumstance from which the jury may reasonably draw the inference* and find in light of surrounding circumstances shown by the evidence in the case, *that the person in possession not only knew it to be stolen, but also transported it or caused it to be transported in interstate commerce.*" (emphasis supplied)[4]

This Court has recently had an opportunity to consider a trial court instruction that a jury ordinarily would be

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1. 18 U.S.C. § 371.
2. 18 U.S.C. § 2314.
3. 18 U.S.C. § 2315.
4. The full instruction appears at Appendix A hereto.

justified in inferring from unexplained possession of recently stolen property that the defendant possessed it with knowledge that it was stolen, in *Barnes* v. *United States*, ... U.S. ....., 37 L. Ed. 2d 380, 93 S. Ct. ..... (1973). The *Barnes* court held that such an instruction satisfied the dictates of due process in that the common law inference encompassed thereby met the reasonable doubt standard which the Court held to be applicable in criminal cases, i.e., that the evidence necessary to invoke the inference be sufficient for a rational juror to find the inferred fact beyond a reasonable doubt. However, the Court cautioned in its opinion against undue extension of its doctrine in *Barnes*, stating: "We do not decide today whether a judge formulated inference of lesser age or less widely accepted may properly be emphasized by means of a jury instruction." Id., at Note 9.

In *Barnes*, the Court reviewed four recent decisions in which it had considered the validity under the Due Process Clause of criminal presumptions and inferences, i.e., *Turner* v. *United States*, 396, U.S. 398, 24 L. Ed. 2d 610, 90 S. Ct. 642 (1970); *Leary* v. *United States*, 395 U.S. 6, 23 L. Ed. 2d 57, 89 S. Ct. 1532 (1969); *United States* v. *Romano*, 382 U.S. 136, 15 L. Ed. 2d 210, 86 S. Ct. 279 (1965); and *United States* v. *Gainey*, 380 U.S. 63, 13 L. Ed. 2d 658, 85 S. Ct. 754 (1965).

In *Gainey*, supra, the Court sustained the constitutionality of an instruction authorizing the jury to infer from a defendant's unexplained presence at an illegal still that he was carrying on "the business of a distiller or rectifier without having given bond as required by law", upholding the inference on the basis of the comprehensive nature of the "carrying on" offense and the common knowledge that illegal stills are secluded secret operations. In *Romano*, supra, however, the Court determined that mere

presence at an illegal still could not support the inference that the defendant was in possession, custody or control of the still, a narrower offense, holding that mere presence held too tenuous a connection with possession to permit a reasonable inference of guilt. In *Leary*, supra, the Court considered a challenge to a statutory inference that possession of marihuana, unless satisfactorily explained, was sufficient to prove that the marihuana had been illegally imported; and in view of the significant possibility that any given marihuana was domestically grown and the improbability that a marihuana user would know whether his marihuana was of domestic or imported origin, concluded that the inference did not satisfy due process, stating that an inference is " 'irrational' or 'arbitrary', and hence unconstitutional, unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." 395 U.S., at 6, 23 L. Ed. 2d, at 57. In *Turner*, supra, the Court considered the constitutionality of instructing the jury that it may infer from possession of heroin and cocaine that the defendant knew these drugs had been illegally imported, upholding the inference with regard to heroin and striking it down with regard to cocaine. The Court found it unnecessary to resolve whether the more likely than not standard referred to in *Leary*, supra, or a reasonable doubt standard controlled in criminal cases, as the inference was valid by either standard with regard to heroin, and by neither with regard to cocaine. Finally, in *Barnes*, the Court established that the reasonable doubt standard is the controlling factor in criminal cases, and that a criminal inference satisfies due process only where the evidence necessary to invoke the inference is sufficient to permit a rational juror to find the inferred fact therefrom beyond a reasonable doubt.

Petitioner respectfully contends that the foredescribed instruction tendered in the present case meets neither the reasonable doubt standard proscribed by *Barnes*, the more likely than not standard laid down by *Leary*, or even the rational connection test espoused by the earlier cases. The inference contended for here can be founded on nothing stronger than conjecture. To infer from possession of recently stolen property that the possessor knew that it was stolen is one thing. But to infer from that possession that he likewise transported it or caused it to be transported in interstate commerce, or even received it in interstate commerce, is quite another. As Mr. Justice Douglas noted in his dissent in *Barnes*, supra:

> "We held in *Tot* v. *United States*, 319 U.S. 463, 87 L.Ed. 1519, 63 S.Ct. 1241, that where a federal Act made it unlawful for any convicted person to possess a firearm that had been shipped in interstate or foreign commerce, it was unconstitutional to presume that a firearm possessed by such person had been received in interstate or foreign commerce. The decision was unanimous." 37 L. Ed. 2d, at 390.

The circumstances of the case at bar are not dissimilar to *Tot*. Expressed in terms of the reasonable doubt test laid down in *Barnes*, to sustain the validity of the inference opted for in the present case, it would be necessary to say that mere proof of possession in one state of property recently stolen in another is sufficient to permit a rational juror to conclude beyond a reasonable doubt not only that the possessor knew the property to be stolen, but that he likewise had transported it or caused it to be transported in interstate commerce. Such a conclusion is of course patently absurd, the inferred fact bearing no more relationship to the proven than the marihuana

presumption condemned by *Leary*, supra or the cocaine presumption struck down by *Turner*, supra. In the instant case it would permit of proof by inference of not one but *two* of the essential elements of the crimes sought to be proved, i.e., both knowledge *and* transport or receipt. Petitioner respectfully contends that such an extension of the doctrine laid down by *Barnes*, by allowing the grounding of one inference upon another so as to permit the ultimate inference of facts entirely unrelated to those proven, is in direct violation of his right to due process of law.

One additional point need be made with respect to the inference flowing from the wrongful instruction in this case. To allow such an inference would not only permit proof by inference of two essential elements of the crimes sought to be proved; it would likewise permit the very *creation* of crime by inference. It is only through their connection with interstate commerce that the offenses here charged become federal crimes. If juries are allowed to simply supply that connection by inference drawn from mere possession of property stolen in another state, the federal courts will be laid open for trials in connection with virtually every burglary, larceny and theft which occurs in the land. In the present context of overcrowded courts and dockets and constant striving for measures of judicial economy in order to promote justice, such an enormous extension of federal jurisdiction "by inference" would seem ludicrous.

2. The admission of evidence which was inconsistent with or contradictory to statements previously made by petitioner for the purpose of proving consciousness of guilt and unlawful intent, and instructing the jury that such evidence might be so received, does not comport with due process where such inconsistencies do not reach the corpus delicti of the crimes sought to be proved.

In its charge to the jury in the present case, the trial court said:

> "When a defendant voluntarily and intentionally offers an explanation or makes some statement tending to show his innocence, and this explanation or statement is later found by you beyond a reasonable doubt to be false, the jury may consider whether the circumstantial evidence points to a consciousness of guilt."[5]

United States v. *Lacey*, 459 F. 2d 86 (C.A. 3d 1972) illustrates the proper and permissible use of prior exculpatory statements from an evidentiary standpoint, where the facts that they tend to prove go directly to the corpus delicti of the crime. However, as related in *United States* v. *McConney*, 329 F. 2d 467 (C.A. 2d 1964) (which case is almost directly in point in this case), where the facts which the prior statements tend to prove are clearly not sufficient in and of themselves to establish the necessary and essential element of the crime sought to be proved, *i.e.*, *knowledge*, they do not constitute a sufficient basis, even if established as false, to permit an inference of guilt adequate to sustain a conviction.

Exculpatory statements, as defined in *Lacey*, supra, are explanations tending to explain or excuse an act, which

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5. The full instruction appears at Appendix B hereto.

when shown to be false, may be circumstantial evidence of guilty consciousness, and the jury may consider them as such. However, as related in *McConney,* supra, to sustain a conviction, the statements must relate directly to the corpus delicti of the crime.

The Tenth Circuit makes reference to the prior exculpatory statements admitted as evidence of guilty consciousness and unlawful intent on the part of petitioner in the case at bar at Page 10 of its Opinion:

> "The alleged erroneously admitted evidence consisted of the hotel records indicating he had not been registered at the hotel; the evidence showing a lack of necessity of taking the treasury bill to Kansas City to obtain funds on it; the inconsistent and contradictory statements made by Tager regarding the amount of his fee in the transaction; and testimony that Tager had not made repeated declarations of his intent to have the bill authenticated by federal authorities."

The hotel records, admitted through testimony by a Mr. Vernon R. George, Assistant Manager of the Flamingo Hotel in Las Vegas, Nevada (Tr. 439) over objection of defense counsel, purportedly showed an inconsistency between registration information given by petitioner at an F.B.I. interview some eighteen months prior to his indictment and the hotel records for the weekend in question. At the time of the F.B.I. interview, petitioner purportedly advised that he had registered at the Flamingo Hotel on his arrival in Las Vegas at some time prior to the alleged conspiracy. It is undisputed from the record that petitioner had never heard of the treasury bill forming the subject matter of the alleged crimes nor of the other principals in the alleged conspiracy until some time after his arrival in Las Vegas. Accordingly, his registration clearly predated the alleged conspiracy and the substantive crimes

with which he was charged. Any attempt to secrete his whereabouts by a false registration or registration under an assumed name at the Flamingo or any other hotel would of necessity have been entirely unrelated to those crimes; and any information relating thereto would neither reach the corpus delicti of the crime nor even the test of relevancy supplied by the Federal Rules.[6] The evidence as to the lack of necessity of taking the treasury bill to Kansas City was supplied largely by Mr. Richard Sosnika, a Las Vegas banker who testified solely as to what commercial banking practices actually *are* in Las Vegas, Nevada, but who provided no hint of an answer to the only material question relating to those practices, i.e., what the parties involved *actually knew, believed them to be or were informed as at February 7, 1970.* Evidence regarding supposed contradictory statements by petitioner with respect to the amount of his fee as stated immediately following the termination of the alleged conspiracy and at his appearance before a federal grand jury many months subsequent thereto was admitted largely through testimony by F.B.I. agent Airey (Tr. 587), and otherwise from banker Dirksen, the impropriety of which will be treated later in this petition. The record demonstrates that agent Airey's recollection was refreshed for such testimony from secondary evidence (Tr. 433/34) in the form of transcribed notes regarding what the petitioner had stated his fee was to be at the time of an F.B.I. interview immediately following termination of the alleged conspiracy, which memoranda had not been furnished for review and refreshment of recollection by petitioner at the time of his grand jury testimony (Tr. 591), as was common practice, and as to which petitioner had only suggested at the time of the grand jury testimony that the agent might have made an error in the transcription of his earlier notes. As is clear from the record, petitioner never

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6. Rule 401, Federal Rules of Evidence.

denied that he was to receive a fee; neither did he specifically deny the amount of the fee as suggested by the agent's memory. He only questioned, during his grand jury testimony given many months after the initial interview, without benefit of the customary review afforded witnesses by the Bureau's own admission (Tr. 591), the accuracy of the agent's secondhand notes and whether his fee would have comported with that notation. As clear a case could have been made for his having acquiesced in the agent's recollection of the amount of the fee as for his having refuted it. Without such disclaimer, no prior inconsistency actually existed, but even if it had, it would not have met the *McConney* test of reaching the corpus delicti of the crime, as *any* fee for an illegal act would be wrongful. With respect to the question of petitioner's expressed intention to have the treasury bill in question checked out, the Circuit stated (Op. 5) that there was "some evidence" showing that petitioner suggested to the bank's officers that federal authorities be contacted for the purpose of establishing the genuineness of the bill, and (Op. 7) that both Rasmussen and Casady testified that petitioner had made no statements that he was going to contact federal authorities to verify the authenticity of the bill. In fact, both Rasmussen (Tr. 112; 152/53) and Casady (Tr. 190; 268/69) testified repeatedly, unequivocably and without contradiction that petitioner had insisted that the bill be checked out thoroughly through his banking institution, and by reason of the fact that the subject security was a United States Treasury obligation, this investigation must, by implication, have been required to be carried out by contact with federal authorities. Uncontroverted testimony by both bank officials (Tr. 574/75; 557/62) and F.B.I. agents (Tr. 588/93; 597/98) confirms petitioner's insistance upon such investigation. Contrary to the Court's suggestion that there was "some evidence" of petitioner's

"suggestion", there was repeated and uncontroverted evidence of his "insistance". There was no evidence to the contrary. There may have been a discrepancy as to which federal agency was to be checked, but this question clearly does not reach the corpus delicti.

Petitioner respectfully contends that each interjection of purported prior exculpatory statements into the present case by the prosecution was nothing more than an attempt to slander and prejudice him in the eyes of the jury, to confound him in his defense, and to inject by inference and innuendo the essential element of knowledge which it was otherwise unable to prove. Even if such prior statements were shown to be false (which in each case they were not), to allow an inference of guilty consciousness with respect to a crime to flow from proof of statements or actions entirely unrelated to that crime, or which do not reach the corpus delicti thereof, does not comport with due process of law. It is simply another application of the type of inference of guilt without proper association which was condemned by *Romano, Leary, Turner* and *Tot,* supra.

3. The decision of the United States Court of Appeals for the Tenth Circuit conflicts with the prior decisions of this Court and of the various courts of appeal with respect to its affirmance of the trial court's rulings on the admissability and use by the prosecution of prior inconsistent statements to impeach or refresh the recollection of its own witnesses; such affirmance in the context of this case constitutes a sanction of such a departure by the trial court from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision; and petitioner was so prejudiced by said admission and use as to have been denied due process of law.

As to the use of prior inconsistent statements by the government in this case, the Circuit simply states (Op. 10):

> "The use of such testimony for this purpose rests in the sound discretion of the trial judge. We find no abuse of that discretion in the trial here."

Petitioner would contend however, that each use by the government of prior inconsistent statements in the subject case violates a number of proscriptions established by clear precedent garnered from decisions of this Court and those of the various Courts of Appeal. Since no limiting instruction was given with respect to any of them, *all* violate the fundamental requirement that it is the duty of the court to instruct the jury as to the limited purpose for which such evidence may be considered.[7] On this basis alone, under the cases cited, each such use involved prejudicial error. Most, if not all similarly violate the equally

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7. *Sprinkle* v. *Davis*, 111 F. 2d 925 (C.A. 4th 1940); *United State* v. *Barnes*, 319 F. 2d 290 (C.A. 6th 1963); *Valentine* v. *United States*, 272 F. 2d 777 (C.A. 5th 1959); *Cannady* v. *United States*, 351 F. 2d 796 (C.A. D.C. 1965).

well established principle that the fact that the testimony itself serves an impeaching function does not justify its use where the content of the statement is highly prejudicial.[8] Conversely, few, if any met the established requirement that for impeachment to be valid, it must relate to a "core" issue[9]; and none probably met the most fundamental of all requirements, i.e., that impeachment of one's own witness must be established on the predicate of both "surprise" and "damage"[10], as there was doubtless little "surprise" involved, the prosecutor quite obviously having all prior statements marked and ready to pose on a moment's notice. An examination of the record discloses that prior inconsistent statements were introduced by the government with respect to five separate witnesses, i.e., Gilbert Barnes (Tr. 472/78), David Casady (Tr. 186, 207), Ralph Dirksen (Tr. 570), Jay L. Fihn (Tr. 503/09) and Boyd Rasmussen (Tr. 106/08). Petitioner respectfully submits that prejudicial error was present in each instance, as a closer examination of each such individual use discloses.

Gilbert Barnes, was read a series of questions and answers by the prosecutor beginning at Tr. 423 touching upon whether he, the petitioner, Mr. Fihn, Mr. Rasmussen, or any of them, knew on the afternoon of February 7, 1970 of the degree of difficulty or ease with which a

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8. *Cannady* v. *United States,* supra, n. 7; *Bartley* v. *United States,* 319 F. 2d 717 (C.A. D.C. 1963); *Baber* v. *United States,* 324 F. 2d 390 (C.A. D.C. 1963), *cert. denied,* 376 U.S. 972, 84 S. Ct. 1139, 12 L. Ed. 2d 86 (1964).

9. *3 Wigmore on Evidence,* §§ 1020-23 (Chadbourn rev. 1970); *McCormick on Evidence,* § 36 (1954); *United States* v. *Munchak,* 443 F. 2d 531, 534 (C.A. 2d 1971); *United States* v. *Barash,* 365 F. 2d 395, 401 (C.A. 2d 1966); *United States* v. *Del Pergatorio,* 411 F. 2d 84 (C.A. 2d 1969); *United States* v. *Light,* 394 F. 2d 908 (C.A. 2d 1968).

10. *Goings* v. *United States,* 377 F. 2d 753 (C.A. 8th 1967); *3 Wigmore on Evidence,* §§ 904, 1043 (3d Ed.).

loan could be obtained in Las Vegas, Nevada, secured by a U.S. Treasury Bill, and whether any discussions had been had among them concerning this subject. Mr. Barnes had testified on direct that there had been some discussion of this matter on the day in question and that the general feeling was that it would have been quite difficult to obtain the loan. The government sought to impeach Mr. Barnes by reading him statements and answers from his grand jury testimony of April 21, 1971, which indicated that he had not known how difficult it might have been to place a loan in Las Vegas as at February 7, 1970, and that there had not been discussions concerning this matter. Mr. Barnes repudiated his prior grand jury testimony (Tr. 477), stating that he had not remembered the February 7 conversation at the time of his earlier grand jury testimony, but that his memory had since been refreshed. This is probably the least offensive of the five separate cases in which the prosecution was allowed to improperly place prior inconsistent statements before the jury. It still however lacked one absolutely essential element, i.e., the limiting instruction of the trial court.[11] Without that instruction, as the case was given to the jury, Barnes' out of court statements could be given the same weight as sworn testimony by him at trial, a clear violation of established precedent.[12]

David Casady, after previously testifying (Tr. 186) that defendant Konys had asked him if he could handle

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11. *Sprinkle* v. *Davis, United States* v. *Barnes, Valentine* v. *United States* and *Cannady* v. *United States,* all supra, n. 7.

12. *United States* v. *Dobbs,* 448 F. 2d 1262 (C.A. 5th 1971); *Young* v. *United States,* 97 F. 2d 200 (C.A. 5th 1938); *Slade* v. *United States,* 267 F. 2d 834 (C.A. 5th 1959); *United States* v. *Hicks,* 420 F. 2d 814 (C.A. 5th 1970); *United States* v. *Johnson,* 427 F. 2d 957 (C.A. 5th 1970); *United States* v. *Barnes,* supra, n. 7; *Brooks* v. *United States,* 309 F. 2d 580 (C.A. 10th 1962); *Bridges* v. *Wixon,* 326 U.S. 135, 65 S. Ct. 3443, 89 L. Ed. 2103; *3 Wigmore on Evidence,* § 1018 (3d Ed.).

the treasury bill forming the subject matter of the charges in this case and that Konys had stated that he wanted twenty-five thousand dollars from it, was asked the further question "Was there any discussion of what you would gain by helping him?," to which he responded "Yes, I was to get anything over that that I could get." Casady was then asked, "Did you make any comment to him about what you would hope to gain from it?", and responded, "No. I said, I'll have to find out and see if I can handle the bill or not." Whereupon, at Tr. 186/87, he was confronted with the following prior inconsistent statement, without benefit of any foundation being laid by the prosecution, viz., "Do you recall stating in a prior grand jury appearance that you told Mr. Konys you would try to get thirty thousand dollars for the bill?," to which he responded, "That's right." This testimony is susceptible of double interpretation, either one of which fails. If claimed to be an impeachment by reason of a "surprise" answer, it both fails for lack of foundation and quite obviously runs afoul of the fundamental principle that impeachment of one's own witness is permitted only to remove the adverse effect of any surprise testimony and cannot be used to supply anticipated testimony.[13] Lack of limiting instruction likewise violates precedents previously cited.[14] If offered for refreshment of memory, it offends the equally fundamental principle that when a witness merely fails, when called, to testify in favor of the party calling him, as he was expected to do, but says nothing which tends to aid the case of the adversary party, he

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13. *United States* v. *Dobbs*, *Young* v. *United States*, *Slade* v. *United States*, *United States* v. *Hicks*, *United States* v. *Johnson*, *United States* v. *Barnes*, *Brooks* v. *United States*, and *Bridges* v. *Wixon*, all supra, n. 12; and *3 Wigmore on Evidence*, § 1018.

14. Note 11, supra.

cannot be impeached by the party who calls him.[15] Additionally, as to petitioner, the testimony seriously violates clearly established precedent earlier cited. It is highly prejudicial as to him[16] in that it involves a pre-conspiracy conversation before he was ever even contacted and for that reason is likewise wholly collateral and immaterial as to him.[17] The amount which Casady hoped to profit, his consciousness of guilt or his knowledge that the bill was stolen prior to the alleged conspiracy, are irrelevant as a matter of law as to petitioner's guilt or knowledge.

The prosecution again asserted a prior inconsistent statement with respect to Casady's testimony at Tr. 207. After having been asked on direct (Tr. 206) whether he could recall the exact words used by petitioner in telling him that something was wrong when the F.B.I. were on their way to investigate the bill at the Kansas City bank, and having responded "No, he said, 'There is something wrong with the bill and the Secret Service is coming out to talk to us about it' ", he was confronted by the prosecutor without foundation, with the following question, viz., "Do you recall making a statement to Mr. Owsley of the F.B.I., that Mr. Tager said to you at the time, 'We got problems'?" Casady then responded, "I said—I remember him saying, 'We got problems, the Secret Service is coming out to talk to us about that bill,' I said, 'I don't want to talk to them.' " Again, the object of the prosecution, as in the foregoing examples, was obviously to interject hearsay testimony into the record

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15. *Goings* v. *United States*, supra, n. 10; *United States* v. *Booz*, 451 F. 2d 719 (C.A. 3d 1971); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129 (1939), *reh. denied*, 310 U.S. 658, 60 S. Ct. 1091, 84 L. Ed. 1421 (1939); *Rosenthal* v. *United States*, 248 F. 684 (C.A. 8th 1918).

16. Note 8, supra.

17. Note 9, supra.

without proper foundation. It is again subject to the criticism that it runs afoul of the proscription that prior statements of a witness are admissable only to discredit a witness and not competent as substantive evidence of the facts to which the prior statement relates, if termed a response to a surprise[18]; and if one attempts to justify it on the basis of refreshment of memory it violates a further number of established prohibitions, viz., prior inconsistent statements may not be admitted into evidence or their contents even seen by the jury[19], previously given statements cannot be offered to substitute for a witness' testimony under the guise of refreshing recollection"[20], proper exhaustive foundation was not laid[21], and the refreshment procedure cannot be used to fill in a witness' memory gaps by the insertion of hearsay statements suggested to him in the place of his own sworn testimony[22]. Additionally, the limiting instruction is once again missing, so as to do violence to authorities cited above[23]. And here too, the injected hearsay is so inflammatory and prejudicial as to violate proscriptions noted supra[24].

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18. *Goings* v. *United States*, supra, n. 10; *3 Wigmore on Evidence*, §§ 904, 1018, 1043 (3d Ed.); *United States* v. *Dobbs*, supra n. 12; *Culwell* v. *United States*, 194 F. 2d 808 (C.A. 5th 1952); *Young* v. *United States*, *Slade* v. *United States*, *United States* v. *Hicks*, *United States* v. *Johnson*, *Brooks* v. *United States*, and *Bridges* v. *Wixon*, all supra, n. 12; *United States* v. *Barnes*, supra, n. 7.

19. *United States* v. *Booz*, supra, n. 15; *3 Wigmore on Evidence*, § 763 (Chadbourn rev. 1970).

20. *Goings* v. *United States*, supra, n. 10.

21. *Goings* v. *United States*, supra, n. 10; *United States* v. *Socony-Vacuum Oil Co.*, supra, n. 15.

22. *Goings* v. *United States*, supra, n. 10; *Rosenthal* v. *United States*, supra, n. 15.

23. Note 11, supra.

24. Note 8, supra.

Ralph Dirksen. After having been asked (Tr. 569), "Did you inquire of him what his interest in the bill was?", and having received the response, "I think there was some conversation regarding that but I don't recall what the conversation was", and again (Tr. 570), "Did Mr. Tager ever tell you what he hoped to derive out of completing the transaction on this treasury bill?", with the answer, "I can't recall", the prosecutor once more, without proper foundation[25], seized upon an opportunity to inject prejudicial hearsay evidence into the record by reading the following questions and answers from Mr. Dirksen's prior grand jury testimony, viz., Question: "I realize we are asking about events that were approximately a year ago, but give us your best recollection of the amount Mr. Tager said he expected to gain by getting this bill cashed." Answer: "Well, I think it was five or ten; I believe it was ten thousand dollars that he would get as a commission for helping him get the bill cashed." And then, Question: "Do you recall that question and answer?" Answer: "Yes." Question: "Does that in any way help to refresh your memory now?" Answer: "I assume that must have been the conversation if I remembered it at that point. This has been quite a while since then." Question: "The question is after hearing that question and answer, can you now tell us what Mr. Tager told you as to the amount he expected to derive from the transaction?" Answer: "I believe he said ten thousand." The improperly admitted hearsay at this point is prejudicial in the highest possible degree. It is blatant hearsay, injected with no proper foundation or even a pretense at one. As a device for refreshing memory, it is a flagrant violation of authorities noted above[26]. In

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25. Note 21, supra.

26. *Goings* v. *United States*, supra, n. 10; *United States* v. *Socony-Vacuum Oil Co.*, supra, n. 15.

addition, as Mr. Dirksen had given no testimony in favor of the prosecution at this point, and likewise said nothing that would in any way tend to aid the petitioner, it does grave injustice to the basic general theory of admitting a prior inconsistent statement, i.e., the cancellation of an adverse answer by which a party is surprised. Where a witness gives no testimony injurious to the party calling him because of lack of memory, there is no basis for impeachment under the rule.[27] Even if the witness adopts the prior statement as true, the error is not cured. It is still a hearsay statement suggested to the witness rather than his own statement given under oath[28]. Again, the limiting instruction is absent[29] And once more, clear violation of precedent heretofore cited are present[30] by reason of the prejudicial character of the testimony.

Jay L. Fihn. Over objection by defense counsel to the propriety of his impeaching his own witness (Tr. 503), a series of questions and answers from prior grand jury proceedings were likewise read to Mr. Fihn by the prosecution. Fihn had earlier testified (Tr. 500 through 503) that there had been two reasons discussed as to why a loan on the treasury bill in question should be handled by some out of town party, one being the difficulty of obtaining loans in Las Vegas, and the other being a desire by Konys to secrete assets from his wife. Beginning at

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27. *Goings* v. *United States,* supra, n. 10; *United States* v. *Booz,* supra, n. 15; *Kuhn* v. *United States,* 24 F. 2d 910 (C.A. 9th 1928), modified on other grounds, 26 F. 2d 463, *cert. denied, Lee* v. *United States,* 278 U.S. 605, 49 S. Ct. 11, 73 L. Ed. 533 (1928); *Bushaw* v. *United States,* 353 F. 2d 477 (C.A. 9th 1965), *cert. denied,* 384 U.S. 921, 86 S. Ct. 1371, 16 L. Ed. 2d 441 (1966); *United States* v. *Duff,* 332 F. 2d 702 (C.A. 6th 1964).

28. *Goings* v. *United States,* supra, n. 10; *Rosenthal* v. *United States,* supra, n. 15.

29. Note 11, supra.

30. Note 8, supra.

Tr. 503, Prosecutor Cornwell began reading back the prior grand jury testimony. He first attempted by argument with the witness to convert petitioner's inquiry as to why a loan couldn't be made in Las Vegas to an affirmative statement by Fihn that it could be done. Then follows a series of questions and answers posed before the grand jury indicating that Fihn in fact knew that a loan could have been obtained in Las Vegas. In each instance, Fihn explained that, yes, he had known at the time of the grand jury appearance, a year after the occurrence, that a loan could have been obtained because by that time he had had an opportunity to look into the question and value of treasury bills. But, he explained further, he had not had such information available at the time of the actual occurrence, and did not know at that time that a loan could have been obtained. He insisted that his grand jury answers related purely to his knowledge at the time of his appearance before that body, and not to the time of the actual transaction. The blatant hearsay allowed to enter the record through this testimony, which continued page after biased page, left an indelible mark of prejudice upon the record. In the absence of the limiting instruction clearly required by the dictates of authorities heretofore cited[31], the jury was left with the impression that it could give equal weight to the prior inconsistent statement as that given to the direct testimony of the witness. Under precedent previously cited[32], the absence of such an instruction is clearly prejudicial error; it is in clear violation of established criterion for the impeachement of one's own witness only in cases of surprise[33];

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31. Note 11, supra.

32. *United States* v. *Barnes*, supra, n. 7

33. Note 12, supra; *Culwell* v. *United States*, supra, n. 18.

and, the testimony itself, because of its great prejudice, is a flagrant violation of established precedent.[34]

Boyd Rasmussen, in prior direct testimony (Tr. 101, 104) indicated that in a telephone conference with Casady on the evening before the first telephone contact with petitioner, Rasmussen had said to Casady, "It must be hot if you don't want to take it to the bank," and Casady had replied, "Well, I don't know that. It could be, I guess", and when asked how he interpreted such response, he stated that he couldn't conclude from the response whether it was stolen or not. Whereupon, over objection by defense counsel, the prosecution proceeded to read prior statements (Tr. 106) from a grand jury appearance wherein Rasmussen had indicated that he had in fact interpreted the response as indicating the bill was "hot". Absent limiting instruction, the jury could give equal weight to the trial testimony and the out-of-court statement, clearly error once more[35]. And again, improper impeachment not founded on surprise[36], clear irrelevance and immateriality to petitioner of this testimony regarding a preconspiracy contact between two other individuals[37], and violative prejudicial testimony[38].

It is obvious from the foregoing that clear and blatant error appears throughout the record in each instance where the prosecution made use of prior inconsistent statements to impeach or to attempt to refresh the recollection of its own witnesses. In the context of the present case, petitioner respectfully contends that such error constitutes

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34. Note 8, supra.
35. Note 12, supra.
36. Note 10, supra.
37. Note 9, supra.
38. Note 8, supra.

such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision, as petitioner was so prejudiced thereby as to have been effectively deprived of due process of law.

CONCLUSION

Petitioner respectfully submits that for the additional reasons stated herein, a writ of certiorari should issue to review the judgement and opinion of the Tenth Circuit.

Respectfully submitted,

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CERTIFICATE

The undersigned, Counsel for Petitioner herein, hereby certifies that the foregoing Petition for Rehearing is presented in good faith and not for purposes of delay. Counsel further certifies that the Petition is restricted to intervening circumstances of substantial or controlling effect and to substantial grounds available to Petitioner but not previously presented.

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APPENDIX

APPENDIX A

TRIAL COURT INSTRUCTION REGARDING INFERENCES WHICH MAY BE DRAWN FROM POSSESSION OF STOLEN PROPERTY (Tr. 747)

Possession of property recently stolen, if not satisfactorily explained, is ordinarily a circumstance from which the jury may reasonably draw the inference and find, in the light of surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen.

And possession in one state of property recently stolen in another state, if not satisfactorily explained, is ordinarily a circumstance from which the jury may reasonably draw the inference and find in the light of surrounding circumstances shown by the evidence in the case, that the person in possession not only knew it to be stolen property, but also transported it or caused it to be transported in interstate commerce.

Ordinarily, the same inferences may reasonably be drawn from a false explanation of possession of recently stolen property.

The term "possession" means actual control, dominion or authority.

The term "recently" is a relative term and has no fixed meaning. Whether property may be considered as recently stolen depends upon the nature of the property and all the facts and circumstances shown by the evidence in the case. The longer the period of time since the theft,

the more doubtful becomes the inference which may reasonably be drawn from unexplained possession.

If you should find beyond a reasonable doubt from the evidence in the case that the United States Treasury Bill described in the indictment was stolen and was transported or caused to be transported in interstate commerce by a specific defendant as charged, and that, while recently stolen, the property was in the possession of the defendant in another state from that in which it was stolen, you may from those facts draw the inference that the United States Treasury Bill was transported or caused to be transported in interstate commerce by said defendant with knowledge that it was stolen, unless possession of the recently stolen property by said defendant is explained to the satisfaction of the jury by other facts and circumstances in evidence in the case.

In considering whether possession of recently stolen property has been satisfactorily explained, the jury is reminded that in the exercise of constitutional rights, a defendant need not take the witness stand and testify.

There may be opportunities to explain possession by showing other facts and circumstances independent of the testimony of a defendant.

You will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

It is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in the case warrant any inference which the law permits you to draw from possession of recently stolen property. If any possession a defendant may have had of recently stolen property is consistent with innocence or if you entertain a reasonable doubt of guilt, you must acquit him.

APPENDIX B

TRIAL COURT INSTRUCTION REGARDING INFERENCES WHICH MAY BE DRAWN FROM PRIOR EXCULPATORY STATEMENTS (Tr. 752)

Conduct of a defendant, including statements knowingly made and acts knowingly done upon being informed that a crime has been committed or upon being confronted with a criminal charge, may be considered by the jury in the light of all other evidence in the case in determining guilt or innocence.

When a defendant voluntarily and intentionally offers an explanation or makes some statement tending to show his innocence and this explanation or statement is later found by you beyond a reasonable doubt to be false, the jury may consider whether the circumstantial evidence points to a consciousness of guilt. Ordinarily, it is reasonable to infer that an innocent person does not usually find it necessary to invent or fabricate an explanation or statement tending to establish his innocence.

Whether or not evidence as to a defendant's voluntary explanation or a statement points to a consciousness of guilt, and the significance to be attached to any such evidence, are matters exclusively within the province of the jury.

A statement or an act is knowingly made or done if made or done voluntarily and intentionally and not because of mistake or accident or other innocent reason.

The jury will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

The very nature of an admission claimed to have been made by a defendant outside of court requires that the circumstances surrounding it be subjected to careful scrutiny always, in order to determine surely whether it was voluntarily and intentionally made.

If the evidence in the case does not convince beyond a reasonable doubt that an admission was made voluntarily and intentionally, the jury should disregard it entirely. On the other hand, if the evidence in the case does show beyond a reasonable doubt that an admission was in fact voluntarily and intentionally made by a defendant, the jury should consider it as evidence against the defendant who voluntarily and intentionally made the admission.